

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE FABELA)	
Claimant)	
VS.)	
)	Docket No. 245,046
ARCHITECTURAL CAST STONE MFG.)	
Respondent)	
AND)	
)	
SAFECO/AMERICAN STATES INSURANCE CO.)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on June 30, 2000.

ISSUES

This case involves a claim for a hernia injury that is alleged to have occurred "February 1, 1999 and each and every working day thereafter." The last day claimant worked for respondent before leaving work for surgery was on or about April 7, 1999. Claimant seeks payment of the expenses for his medical treatment and temporary total disability compensation. Respondent denies claimant met with personal injury by accident on the dates alleged and denies any accidental injury arose out of the employment. It is the position of the respondent, insurance carrier and the Workers Compensation Fund that claimant's injury occurred before he went to work for respondent and while he was working for the previous employer, Ritchie Associates, Inc.

The Administrative Law Judge found claimant suffered an aggravation of his preexisting hernia condition and therefore had proven personal injury by accident that arose out of and in the course of his employment with respondent. Judge Barnes awarded claimant temporary total disability compensation and medical benefits to be paid by the respondent.

On appeal, respondent seeks review of the ALJ's finding that claimant met with personal injury by accident arising out of and in the course of his employment with

respondent. Respondent also objects to the admission of certain medical records that it was not provided before the preliminary hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant left Ritchie on February 5, 1999 and began working for respondent on February 8, 1999. Both jobs required claimant to lift heavy stones.

Dr. Whitney L. Vin Zant, the treating surgeon, opined that claimant's hernia started with his employment with Ritchie but was aggravated by his work with respondent. "That within a reasonable degree of medical probability, the heavy manual labor that Mr. Fabela performed for Architectural Cast Stone, Inc., including heavy lifting of large stones more probably than not aggravated Mr. Fabela's hernial condition."

In general, the Kansas Workers Compensation Act requires employers to compensate employees for personal injuries or aggravations of preexisting injuries incurred through accidents arising out of and in the course of employment. K.S.A. 1999 Supp. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 2, 899 P.2d 1058 (1995); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987). The question of whether an aggravation of a preexisting condition is compensable under workers compensation turns on whether claimant's work activity aggravated, accelerated or intensified the disease or affliction. Boutwell v. Domino's Pizza, 25 Kan. App. 2d 100, 121, 959 P.2d 469, *rev. denied* 265 Kan. ____ (1998). The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact. Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

Claimant described the onset of symptoms in his groin as occurring at Ritchie. He attributes the worsening of his symptoms and need for surgery to his work with respondent. Clearly, claimant's job duties with respondent involved heavy lifting. Counsel for the insurance carrier argues that "claimant arrived at work for the respondent on February 8, 1999 already in need of hernia repair surgery." But there is no medical evidence or testimony to support this assertion. Furthermore, there is no medical testimony which refutes claimant's assertion that his condition was aggravated by his work with respondent. Based upon the record presented to date, the Appeals Board finds that claimant's condition was aggravated and made worse by his work with respondent. Claimant, therefore, suffered injury by accidents that arose out of and in the course of his employment with respondent and respondent is required to pay the costs of claimant's treatment.

The issue regarding the admissibility of evidence is not a jurisdictional issue and, therefore, cannot be decided on an appeal from a preliminary hearing order. K.S.A. 1999 Supp. 44-534a, K.S.A. 44-551(b), Carpenter v. National Filter Service, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the June 30, 2000, Order entered by Administrative Law Judge Nelsonna Potts Barnes should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2000.

BOARD MEMBER

c: Joni J. Franklin, Wichita, KS
 Alexander B. Mitchell, II, Wichita, KS
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 Nelsonna Potts Barnes, Administrative Law Judge
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